

Charles S. Zanetis and Shayne L. Zanetis d/b/a Quality Hotel and Marvine Nesbeth. Case 9-CA-30145

May 30, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On April 26, 1994, the National Labor Relations Board issued a Decision and Order in this proceeding¹ ordering the Respondent, Charles S. Zanetis and Shayne L. Zanetis d/b/a Quality Hotel,² to, inter alia, offer reinstatement to employees Wanda Alexander, Dale Brown, Sharon Davis, Barbara Hall, Latasha Hall, Pearl McDole, Shannon McDole, Janel Mitchell, Marvine Nesbeth, and Tjuani Perry, and to make them whole for any losses suffered as a result of the Respondent's discrimination against them. On March 12, 1996,³ the United States Court of Appeals for the Sixth Circuit enforced the Board's Order in full.⁴

On August 13, the Regional Director for Region 9 issued a compliance specification and notice of hearing alleging that a controversy had arisen over the amount of backpay due under the terms of the Board's Order and notifying the Respondent that it must file an answer complying with the Board's Rules and Regulations within 21 days of service of the backpay specification.⁵ The Respondent did not file an answer nor did it request an extension of time to do so. By letter dated October 18, the Respondent was forwarded a copy of the compliance specification and was advised that a Motion for Summary Judgment would be filed if an answer was not filed with the Regional Office by October 28.

On November 12, the General Counsel filed a Motion for Default Summary Judgment with the Board, with a memorandum in support and exhibits attached, citing the Respondent's alleged failure to file an answer to the compliance specification. On November 14, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.

On December 6, the General Counsel filed with the Board a Motion for Partial Summary Judgment and

Motion to Strike Portions of the Respondent's Answer to Compliance Specification, with an exhibit attached. In that motion, the General Counsel represented to the Board that the Respondent, proceeding pro se, had filed an answer to the compliance specification, but with the Sixth Circuit rather than with the Regional Office. The Sixth Circuit had received the Respondent's answer on October 28, and had forwarded it to the Board's Division of Judges on November 18.⁶ The General Counsel requested that the Motion for Partial Summary Judgment and to Strike be considered by the Board in the event the Board accepted as timely the Respondent's answer filed with the court and subsequently forwarded to the Board. Prior to the filing of this motion, on November 18, the Respondent was advised by letter from the Regional Office that its answer was deficient in various respects and, further, that any amended answer the Respondent wished to file was due in the Regional Office by November 25. The Respondent has not filed an amended answer.

On December 10, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Partial Summary Judgment should not be granted. The Respondent filed no response.

Having duly considered the General Counsel's initial Motion for Summary Judgment, we find that default summary judgment is not appropriate here. The Respondent filed an answer to the backpay specification within the time limits set out in the Board's October 18 letter, although the answer was erroneously filed with the Sixth Circuit rather than with the Regional Office. Under the circumstances, and because the answer was filed without benefit of counsel, we will not preclude a determination on the merits simply because of the Respondent's failure to comply with all of the Board's procedural rules.⁷

We, therefore, consider the General Counsel's Motion for Partial Summary Judgment and Motion to Strike. The Respondent's answer to the backpay specification essentially admits in part and denies in part the allegations of the compliance specification. The Respondent disputes the duration of the backpay period set forth in paragraph 1 of the compliance specification, contending that the backpay period should be tolled as of December 17, 1992, when it alleges it offered the discriminatees reinstatement. With respect to the gross backpay allegations set forth in paragraphs 2 and 3 and Appendix A of the specification, the Re-

¹ 313 NLRB 1119.

² Although not specifically noted in its decision, the Board adopted the administrative law judge's finding that Charles S. Zanetis and his wife Shayne L. Zanetis were joint owners of the Respondent Quality Hotel, a sole proprietorship. The Board's Order, although inadvertently omitting the name Shayne L. Zanetis, adopted the judge's recommended Order which specifically applied to Shayne L. Zanetis as well as her husband. *Quality Hotel* at 1120 fn. 4 and 1125.

³ All dates are in 1996 unless otherwise indicated.

⁴ No. 94-6425 (unpublished).

⁵ The caption of the compliance specification reflected the finding and recommended Order of the judge discussed in fn. 2, supra.

⁶ A certificate of service accompanying the Respondent's answer indicates that, in addition to the Sixth Circuit, counsel for the General Counsel was served with a copy of the answer; however, there is no indication that the Board received it.

⁷ Although it does not appear that the Respondent's answer was served on the Charging Party as required by Sec. 102.21, we note the pro se basis on which the Respondent was proceeding. See *Dismantlement Consultants*, 312 NLRB 650 fn. 6 (1993).

spondent disputes the accuracy of the formula used and amounts of gross backpay calculated. The Respondent also disagrees with the calculations of interim earnings and net backpay, and the inclusion of Shayne L. Zanetis as a party respondent.

The General Counsel, in his Motion for Partial Summary Judgment and to Strike, essentially alleges that the Respondent's denials with respect to gross backpay fail to comply with the substantive requirements of the Board's Rules because they do not set forth with specificity the basis for disagreement and supporting figures or premises for the Respondent's position. With respect to the alleged tolling of the backpay period and the naming of Shayne L. Zanetis as a party respondent, the General Counsel asserts that these matters were litigated and resolved in the underlying unfair labor practice proceeding.

On the entire record in this case, the Board makes the following

**Ruling on Motion for Partial Summary Judgment
and to Strike**

Section 102.56(b) and (c) of the Board's Rules and Regulations states in pertinent part:

(b) As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

As noted above, the General Counsel in his motion submits that the Respondent has failed to comply with the above-quoted provisions of the Board's Rules in that its answer does not set forth the basis for disagreement with the gross backpay allegations nor does it provide its position in detail as to the applicable premises with supporting figures. We agree with the General Counsel's contentions. The matters denied concern the various factors entering into the computation of gross backpay, subjects that are within the Respond-

ent's knowledge. As to these matters, the Respondent's answer effectively admits that some backpay would have been earned but contends that the gross amount "will differ according to business." This general denial disputes the accuracy of the figures in the specification but is insufficient under the Board's Rules because it completely fails to set forth the Respondent's position as to applicable premises with any supporting figures.

Thus, as the Respondent has failed to deny the gross backpay allegations in the manner prescribed in Section 102.56(b) and (c) or to explain its failure to do so, Section 102.56(c) requires that such allegations be deemed admitted to be true. Accordingly, we shall grant the General Counsel's Motion for Partial Summary Judgment with respect to the gross backpay allegations of paragraphs 2 and 3 and appendix A of the compliance specification.

Furthermore, as to the duration of the backpay period, as stated above, the Respondent argues that backpay should be tolled as of December 17, 1992, because that is the date on which it contends that it offered the discriminatees reinstatement. We agree with the General Counsel, however, that the validity of these reinstatement offers was litigated and decided in the unfair labor practice proceeding. The administrative law judge specifically found that the Respondent's offers of that date were deficient. *Quality Hotel*, 313 NLRB at 1125 fn. 23. The judge's findings were adopted by the Board and the Sixth Circuit enforced the Board's Order, which did not cut off backpay for the discriminatees. Thus, in agreement with the General Counsel, we conclude that because an invalid reinstatement offer clearly cannot toll the backpay period, the backpay period continues to November 15, 1993, as alleged in the compliance specification. Accordingly, we additionally grant the General Counsel's Motion for Partial Summary Judgment as to paragraph 1 of the compliance specification setting forth the length of the backpay period.

Similarly, we agree with the General Counsel that the status of Shayne L. Zanetis as a party respondent was litigated and resolved in the underlying proceeding. As stated above, the judge specifically concluded that the hotel, a sole proprietorship, was jointly owned by Charles Zanetis and his wife, Shayne, based on their testimony to that effect. Further, the judge specifically took this joint ownership into account in fashioning his recommended Order, which the Board adopted and the court enforced.⁸ Under these circumstances, we grant the General Counsel's motion to strike that portion of the Respondent's answer that denies Shayne L. Zanetis' individual liability to make whole the discriminatees.

⁸ See fn. 2, *supra*.

Accordingly, we shall grant the General Counsel's Motion for Partial Summary Judgment and Motion to Strike and shall direct a hearing limited to determining the amount of interim earnings due the discriminatees and, hence, the Respondent's net backpay liability. Because we have found that the Respondent has either effectively admitted all other allegations in the specification or denied them in a manner insufficient under Section 102.56(b) and (c) of the Board's Rules and Regulations, we deem the Respondent to have admitted all other allegations to be true.

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to

the allegations contained in paragraphs 1,2,3, and appendix A.

IT IS FURTHER ORDERED that the General Counsel's motion to strike the Respondent's answer to the backpay specification which denies Shayne L. Zanetis' liability to the discriminatees is granted.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 9 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge on the remaining allegations contained in the compliance specification concerning the amount of interim earnings and net backpay liability. The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all record evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.